NO. 47573-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RONALD DAUGHERTY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman, Judge

No. 13-1-05005-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court properly allow defendant's daughter to testify about the molestations he subjected her to as a child when they exposed his similar abuse of a step-granddaughter to be part of a scheme to induce underage-female dependents to have long term sexual relationships with him?

2. Was the abstract reference to time defendant spent in prison rightly deemed inadequate to support a mistrial since it was a lay witness' harmless reply to defense cross-examination about family history impacted by that event?

3. Is defendant unable to prove expert testimony on delayed reporting was improperly admitted given the jurors' need to understand that sexually abused children often reveal their victimization over time?

4. Has defendant failed to prove cumulative error when no error, much less a prejudicial aggregation of error, has been shown?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with four counts of second degree child rape for having sex with his twelve year old step-granddaughter on at least four occasions. CP 1-5. A persistent offender notice was filed because of his two prior convictions for molesting his daughter. CP 4-6. That now adult daughter (A.F.) testified about the abuse as proof of his common scheme for sexually abusing underage female family members under his care. 3RP 199-208; CP 119-24. Two instructions were given to limit the testimony to its proper purpose. CP 135; 15RP 1669.

Another ruling excluded reference to defendant's imprisonment for molesting A.F. 4RP 289-91. A.F. abided by the ruling during the State's examination. 15RP 1665-1709. But she inadvertently dated an event in relation to the imprisonment during cross-examination. 15RP 1710-11. The court denied defendant's motion for a mistrial in part because the prison time was not tied to a case capable of being misused as propensity evidence. 15RP 1720-23. The jury was directed to disregard the remark. 15RP 1724-25; 16RP 1731-32.

Consistent with precedent, the court allowed an expert to explain why children routinely delay reporting sexual abuse.[1] Inconsistent with defendant's description of jurors overcome by prejudicial error, his jury

[1] CP 114-18; 7RP 379-83; 12RP 1187-98.

selectively convicted on Counts I-II and IV, but not Count III. 20RP 2196-98; CP 173-76. A persistent offender sentence was imposed pursuant to statute. 21RP 2216. Defendant's notice of appeal was timely filed. CP 204.

2. Facts

About twenty six years before defendant's trial for raping his step-granddaughter (H.H.), his then four year old daughter (A.F.) was entrusted to his care because her mother lost custody. 15RP 1672. They eventually shared a Washington residence with A.F.'s brothers Donnie[2] and Sean, another younger brother and defendant's wife. 15RP 1673. Defendant was molesting A.F. by the time she turned six. 15RP 1674. One molest occurred in a farmhouse attic adjacent to their home. 15RP 1674-75.[3] He found her playing in the attic in violation of a house rule, pulled her pants down and "play[ed]" with her vagina. 15RP 1675-76. He molested her again in his truck after catching her with cigarette butts. 15RP 1676. He pulled over along a gravel road to their house, then put his fingers in her vagina. 15RP 1676-77.

A.F. and her brother Donnie temporarily moved out-of-state. 15RP 1677-79. Defendant resumed abusing A.F. when they returned. 15RP 1680-81. In one instance, he directed Donnie to take a long shower so defendant could digitally penetrate A.F. on the couch. 15RP 1682-83. On

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[2] For clarity the Response will refer to several witnesses by the first names used at trial. No disrespect is intended.

[3] The State is regrettably forced to specifically describe defendant's sexual misconduct to respond to his ER 404(b) claim.

several occasions he had A.F. sleep with him, claiming to need her as a backup for his alarm. 15RP 1681. Vaginal touching escalated to simulated intercourse, which A.F. described as "dry hump[ing]." 15RP 1681-82. When A.F. was about eight she told defendant her uncle also molested her. 15RP 1685. Defendant made it clear "he was the only one ... allowed to touch her in that manner", showed her a pornographic magazine "and asked ... if it excited [her]." 15RP 1684-86. Then there was "more of the same ... more touching [her] vagina ... some ... penetration." 15RP 1686.

As A.F.'s ninth birthday approached, the family moved in with defendant's new wife Laura.[4] The molestations continued when Laura was away. 15RP 1688-94. So did the "[d]ry humping," as A.F. explained:

> Both of us had our clothes off, and he would , you know – basically just had his penis in between my legs essentially to use my legs as – to get himself off....

15RP 1689-90. He started using an electric razor "to stimulate" A.F.'s " "unclothed" "clitoris." 15RP 1690-91.

Defendant delayed detection by threatening A.F. she would "break up the family" and be responsible for him being taken away if she revealed the abuse. 15RP 1694. She nonetheless confided in Laura. 15RP 1694-96. The disclosure was met with disbelief and handled by the family's church, so he remained in the home where the molestations continued whenever

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[4] 15RP 1687-88; 16RP 1810.

he was alone with A.F. 15RP 1695-1701. He delayed the next disclosure by "threatening" their "family would be torn apart" and A.F. "would likely end up in foster care" if she reported him. 15RP 1701-02. Years passed. 15RP 1702. A.F. was around twelve when defendant last molested her. 15RP 1702. It stopped when he left the home. 15RP 1702.[5]

Twenty four years passed before defendant picked up where he left off with his step-granddaughter H.H.; she was twelve in August, 2012, when she moved into his house.[6] Just like A.F., H.H. lost a parent—her father—at the age of four. 8RP 438-93. Her mother remarried defendant's son Donnie. 8RP 439. Their family, including H.H.'s five year-old sister and little brother, relocated from Ohio amid financial hardship.[7] Her mother worked outside the home. 8RP 456-57. Donnie and defendant's wife regularly left the house, leaving H.H. under defendant's care to do "[b]ad things" while the others were away. 8RP 459-61.

At fifty, defendant initiated the first of those "[b]ad things" after beating H.H. in a money game of blackjack, which he initiated while her younger sister watched television in another room. H.H. was about to lose money to him when he "gave [her] another option:" "fooling around." It began with him kissing her with tongue while "[s]queezing" her breasts.

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[5] The trial court excluded the fact defendant was removed from the home. 16RP 1789-92.
[6] 8RP 443-46; 10RP 810.
[7] 8RP 439-40, 446, 457; 10RP 788.

Id. He stopped to give her six year old sister "a shower." [8] H.H. was afraid to tell since he was helping her family. 8RP 471-72. He told her it would be her "fault" "[t]he family split[] apart." 8RP 472; 9RP 724.

Once the "fooling around" began, defendant pretty much molested H.H. any time he got her alone. 9RP 631. Like the attic of the detached farmhouse where he molested A.F., the new house had a detached "shop" with an attic where he abused H.H.[9] She was with him alone, after school, as it was getting dark. 8RP 480-81. He asked her to go to the attic with him for tools. 8RP 481. Once there, he had her give him a "hand job", then a blow job," which ended with him ejaculating in her mouth. 8RP 481-85. She "gagged" "almost puked ... [b]ecause she couldn't handle it...." *Id.* She went downstairs feeling "[l]ike crap." 8RP 485. He postponed her disclosure by "blackmailing" her with his ability to inform her parents about inappropriate emails she was sending to boys.[10] He convinced H.H. she would be protected if she kept "fooling around with him." *Id.*

Defendant made repeated use of the attic. 8RP 493-95. He touched her breast and penetrated her vagina with his fingers; he had her give him another "hand job and blow job," but refrained from ejaculating "[b]ecause he knew [she] couldn't stand it ...." 8RP 495-97. Other abuse occurred in

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[8] 8RP 463-70; 11RP 1012-13, 1047.
[9] 8RP 473-74, 478, 481; Ex. 58, 61.
[10] 8RP 486-91, 502-03, 607-08; 10RP 984-86; 12RP 1158.

his shop. 8RP 498-99. He sodomized her. 8RP 601-02. He rubbed his penis against her vagina. 9RP 710-11.

H.H. lived in defendant's house for nine months.[11] He created opportunities to continue the abuse after she left. *Id.* He invited her over, routinely to spend the night. *Id.* When she arrived, they did more "bad things." 8RP 519. During one visit, he "massag[ed] her breasts" as she awoke on the couch wearing underwear and his shirt.[12] He had her give him a hand job, stopped short of ejaculation, then took a shower. 8RP 524-25. On another occasion, he brought her to an elderly friend's house. 8RP 529-31; 15RP 1636-37. He touched H.H.'s breasts and inserted his fingers in her vagina in the downstairs laundry room. 8RP 532-33. The abuse stopped when the friend called down about their delay. 8RP 533. He took H.H. on movie dates, which often ended with her spending the night at his house. 8RP 534; 12RP 1137.

Those were not the only films they watched together. Similar to the pornographic magazines he showed his daughter, he showed H.H. videos depicting sexual encounters among children and adults, "hand jobs" and "blow jobs", to teach H.H. to "[] do it right." 8RP 535; 9RP 653. He took H.H. into his bedroom "[t]o fool around" again on the last visit. 8RP 525-26. He had her give him another "hand job" and another "blow job," then sodomized her again. 8RP 527-29, 601-02; 9RP 715.

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[11] 8RP 443-46, 517-18; 10RP 810; 12RP 1137.
[12] 8RP 520-24, 549-52; 9RP 651; Ex. 37.

On Christmas day, he invited H.H. to see his guitar. 10RP 830-31. He also told her "to come over to the house and see [him] more." 14RP 1478-79. H.H. disclosed the abuse to her uncle Sean shortly after because it felt like "a good opportunity to just get it out."[13] Sean broke the news to H.H.'s mother; her "heart sank." 10RP 835; 14RP 1483-84. She told her husband Donnie. 10RP 835-39. Donnie and Sean confronted their father. 10RP 839-40. Defendant mostly wanted to avoid jail; "to keep it in the family," promising "he wouldn't see the kids anymore." 11RP 1058; 14RP 1492-93. He threatened to "commit suicide."[14] He showed Donnie texts H.H. sent six months before, but which defendant oddly kept until confronted with her disclosure, consistent with his threat.[15]

Despite defendant's request to "keep it in the family," police were called. 8RP 418-29. An examination of his phone revealed texts to H.H.; outgoing messages stated:

> "I miss you." "Are you going to come and hang out this weekend?" "How come I don't hear from you?" "I miss ya." "KK, love you tons. See you soon."

14RP 1379. Two messages sent the day of the disclosure admonished her to "[s]top texting," and "[] call." 13RP 1379. H.H. disclosed the abuse to a forensic interviewer, in part to protect her little sister from being similarly abused.[16] Like many children, H.H. was too embarrassed to submit to a

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[13] 8RP 536-40; 10RP 834; 14RP 1481.
[14] 11RP 1058; 12RP 1145; 14RP 1493-94, 1529.
[15] 10RP 840; 11RP 1059-60; 12RP 1154-55; 14RP 1498; 1545.
[16] 8RP 555; 12RP 1155-56, 1198-1209; 13RP 1264-69, 1328-32.

physical examination. *Id.* Evidence of the anal sex was likely lost to the healing process. 13RP 1331-33. And the digital penetration was unlikely to have transected H.H.'s hymen due to her age. 13RP 1341-45.

Defendant and his wife testified at trial. Both claimed H.H. and her siblings moved into their home pursuant to a "pact" the children would not be left with defendant to protect him from false accusations.[17] H.H.'s parents knew nothing of the "pact." *Id.* The claimed fear of false accusations was undermined by defendant's efforts to spend time alone with H.H. after she allegedly threatened to falsely accuse him of molesting her.[18] He admittedly responded to her disclosure by threatening suicide and asking his family not to call the police. 17RP 2071-72.

C. ARGUMENT.

"[P]revention of child abuse is of the highest priority...." ***C.J.C. v. Corp. of Catholic Bishop***, 138 Wn.2d 699, 727, 985 P.2d 262 (1999). "[S]ex offenders pose a high risk of re-offense...." ***State v. Smith***, 185 Wn. App. 945, 955, 344 P.3d 1244 (2015). The community must safeguard children so they may grow into well-developed citizens. ***City of Seattle v. Pullman***, 82 Wn.2d 794, 806, 514 P.2d 1059 (1973).

[17] 9RP 756-5716RP 1811-12; 17RP 2244-45.
[18] 16RP 1885-89; 17RP 1974-75, 2041-61.

1. DEFENDANT'S MOLESTATIONS OF HIS OWN DAUGHTER WERE RIGHTLY ADMITTED FOR THEY EXPOSED HIS GRANDDAUGHTER'S ABUSE TO BE PART OF A SCHEME TO INDUCE HIS UNDERAGE FEMALE FAMILY MEMBERS TO HAVE ENDURING SEXUAL RELATIONSHIPS WITH HIM.

"ER 404(b) is not designed to deprive the State relevant evidence necessary to establish an essential element of its case, but only to prevent a defendant from being cast as a criminal likely to commit the crime. ***State v. Foxhoven***, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); ***State v. Lough***, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Prior acts of child sex abuse are admissible as proof of a common scheme under ER 404(b) if they are:

> (1) Proved by a preponderance of the evidence;
> (2) Admitted for the purpose of proving a common scheme;
> (3) Relevant to prove an element of the crime charged or to rebut a defense, and
> (4) More probative than prejudicial.

Lough, 125 Wn.2d at 852. Appellate courts will not disturb a trial court's ER 404(b) ruling absent manifest abuse of discretion. ***State v. Yarbrough***, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009).

Defendant incorrectly claims the jury should not have assessed whether he raped his step-granddaughter according to the scheme he used to molest his daughter. Admissibility was supported by A.F.'s pretrial testimony, which tracked the trial testimony summarized above. 1PR 16-85; 2RP 90-157. Underlying the ruling are several unchallenged findings,

which should be verities in this appeal. CP 119-25. *See* ***State v. Avery***, 103 Wn. App. 527, 540, 13 P.3d 226 (2000). According to the trial court:

> There are a significant number of common factors between the abuse of A.F. and H.H. Those common factors include:
>
> (1) [I]solating the victims, getting each into situations where each was alone with him;
>
> (2) [R]educing the inhibitions of the victims by showing each pornographic material showing other people engaged in sexual acts as a means of making those acts "okay" to do;
>
> (3) [H]aving the victims engage in sexual acts in their own homes, where he was the authority figure to each;
>
> (4) [A]busing a position of trust with the victims, one being his own child and the other a step-grandchild;
>
> (5) [E]ngaging the victims in sexual acts outside their own homes, but only when each victim was alone with the defendant and he was in a supervisory capacity at the time;
>
> (6) [E]ngaging the victims in a graduated pattern of sexual acts, moving to more serious acts over the passage of time with each;
>
> (7) [H]aving each victim perform sexual acts on a continuing and ongoing basis until it was discovered or he was removed;
>
> (8) [M]anipulating the victims to keep each of them from disclosing the sexual abuse including threats that disclosure would hurt or tear the family apart.

CP 121-22. Variations among the offenses were acknowledged:

> There are also differences in the sexual abuse of these two victims. The differences include:

(1) A.F. was younger than H.H. when the sexual acts began;

(2) [T]he sexually explicit material was magazines with A.F. and videos with H.H.;

(3) [T]he acts began more gradually with A.F., moving from fondling to acts of penetration over the course of time, whereas the acts with H.H. included intercourse much sooner;

(4) [T]he manipulation of A.F. involved telling her she would get in trouble or go to jail and it would hurt the family, and the manipulation of H.H. included threatening to tell about things she had done wrong and it would tear the family apart.

CP 122. But those differences were outweighed by the similarities:

> The court finds the common factors are far more compelling than the subtle differences. Each of the differences is easily explained by the simple fact that H.H. was an older girl when she was first accessible to the defendant. Moreover, the court finds the defendant had a common goal in his sexually abusive behavior, which was to satisfy his sexual desires with girls with whom he was closely related rather than with the children of random strangers or friends. The defendant sought these girls out, establish[ed] his position of trust with them, isolated them, manipulated them, lowered their sexual inhibitions with pornographic images, sexually abused them numerous times and ways, and continued his actions until the victim finally disclosed.

CP 123; 3RP 200-06. Substantial evidence supports each finding.

a. Defendant's method of sexually abusing A.F. and H.H. betrayed a common scheme to maintain long term sexual relationships with underage female family members entrusted to his care.

Prior child sex abuse is relevant to prove charged child sex abuse if both are "naturally to be explained as caused by a general plan" to commit separate but very similar crimes. ***State v. DeVincentis***, 150 Wn.2d 11, 21-24, 74 P.3d 119 (2003); ***State v. Kennealy***, 151 Wn. App. 887, 214 P.3d 200 (2009); ***State v. Gresham***, 173 Wn.2d 405, 422, 269 P.3d 207 (2012). Admissibility does not require unique methods of offense. ***DeVincentis***, 150 Wn.2d at 21. The tolerance for variation reflects understanding crime is goal driven, learned behavior which evolves with experience, maturity and education. *See* ***State v. Yates***, 177 Wn.2d 1, 31-32, 296 P.3d 872 (2013); ***State v. Russell***, 125 Wn.2d 24, 69, 882 P.2d 747 (1994).

Defendant's sexual abuse of A.F. and H.H. revealed a scheme to turn underage female family members under his care into concubines by gradually exposing them to sex within environments he controlled. In both cases, he exploited access attending the children's arrival to his home, then motivated submission and deterred disclosures by leveraging his status against their vulnerability, naivety, affection, fear and shame. Both girls were vulnerable on account of losing a parent. A.F. was removed from her mother's care at about four; the age H.H. was when her biological father

died.[19] Both girls were brought into defendant's home amid destabilizing circumstances beyond their control. A.F.'s mother lost custody; financial hardship resulted in H.H. being uprooted from her life in Ohio.[20]

Once the girls were under his influence, he presented sexual favors as a way to avoid consequences for misbehavior. He initiated A.F.'s abuse upon finding her in the attic, then with cigarettes, in violation of house rules. 1RP 28-31; 15RP 1674-76. Likewise, he initiated H.H.'s abuse after making her indebted to him through a card game, next by threatening to divulge private emails.[21] Both girls were abused inside the home as well as the attics of detached buildings next to the home.[22] Both girls were abused outside the home in places defendant controlled: A.F. was molested in his truck and H.H. was taken to a laundry room belonging to friends who had difficulty accessing it on account of disabilities.[23] He took advantage of distractions to abuse the girls with other children present. Defendant told A.F.'s brother to take a long shower so defendant could molest her on the couch. He similarly molested H.H. in the stairwell as her younger sister watched a television show in the living room. 1RP 37-38; 8RP 464.

The sexual abuse manifested defendant's interests and reservations. He turned both girls into mistresses through escalating sexual encounters,

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[19] 1RP 26-27; 8RP 438-39; 15RP 1669-72.
[20] 1RP 26-27; 8RP 444-46; 15RP 1669-72.
[21] 8RP 463-69, 486-91, 509-10.
[22] *E.g.* 1RP 30-31, 36; 8RP 481-83, 520-21; 15RP 1674-75, 1681-82.
[23] 1RP 28-30; 8RP 529-33; 15RP 1636-371676-77; 16RP 1888-89.

exposure to pornography and emotionally charged communication.[24] He brought H.H. to sleep over after movie dates, and sent her texts typical of an infatuated teenage boy.[25] The girls' vaginas or his penis were the focus of his interest, yet he avoided intercourse likely to cause pregnancies or leave evidence of hymen trauma. He prolonged the relationships through threats of tragedies to befall their families if the misconduct came to light.[26] In both cases he responded to disclosures by trying to induce other caregivers not to involve police.[27] His scheme for sexually abusing underage female family members is unmistakable.

Defendant nonetheless claims the offenses were too dissimilar for admissibility under ER 404(b). His argument too narrowly focusses on incidental variations among similarly purposed acts. Each act satisfied his desire for a specific type of child. Although the acts occasionally varied across victim, time and circumstance, all involved his penis and/or the victim's vagina. The perceptible difference in his methods of abuse are comparable to those deemed insufficient to dissuade a reasonable mind from finding a common scheme. ***Gresham***, 173 Wn.2d at 422-23. And all the different acts, *e.g.*, digital penetrations, manual stimulations, oral sex, "dry humping", even anal sex, shared the common trait of being something other than vaginal intercourse, making them less likely to result

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[24] *E.g.*, 1RP 37-38, 49-50; 2RP 131; 8RP 535-36, 547.
[25] 8RP 534; 12RP 1137; 14RP 1379.
[26] 1RP 42; 8RP 471-72; 15RP 1694-95.
[27] 8RP 15RP 1697-98; 11RP 1058; 14RP 1492-93.

in detection through pregnancies or perceptible hymen trauma. *E.g.* 13RP 1318-20.

On appeal, defendant amplifies the appearance of dissimilarity by comparing his methods within his already distinct scheme for abusing underage female family members. A scheme that puts him in one subclass of predator. Some pedophiles molest unknown children abducted or lured from streets, schools or shopping malls. *E.g.* ***Com. v. Spetzer***, 572 Pa. 17, 25-26, 813 A.2d 707 (2002). Others access victims by cultivating romantic relationships with single parents. *E.g.*, ***State v. Autrey***, 136 Wn. App. 460, 464, 150 P.3d 580 (2006). Still others resort to nonprofit affiliations, religious status or secular employment to victimize children. *E.g.*, ***Doe 6 v. Pennsylvania State Univ.***, 982 F. Supp. 2d 437, 438-440 (E.D. Pa. 2013). Defendant targeted prepubescent to pubescent girls, leaving male children alone; some predators prefer boys. *Id.*; ***State v. Krause***, 82 Wn. App. 688, 691-96, 919 P.2d 123 (1996).

Countless others adopt schemes for sexually assaulting adults—male or female, young and old—through too many deceptive and coercive schemes to count. *E.g.*, ***State v. Davis***, 175 Wn.2d 287, 300, 290 P.3d 43 (2012); ***State v. Yates***, 161 Wn.2d 714, 728-31, 168 P.3d 359 (2007). The lamentable list goes on. Compared against the members of defendant's subclass, or the universe of predators it occupies, the crimes against his daughter and step-granddaughter are naturally explained as part of a scheme for sexually abusing underage female family members entrusted to

his care. A.F.'s testimony was properly admitted.

b. Any undue prejudice attending the jurors' awareness of defendant's scheme for abusing underage female dependents was outweighed by the unique probative value of the evidence.

The "need" for common scheme evidence "is unusually great in child sex abuse cases, given the secrecy in which such acts take place, the vulnerability of the victims, the absence of physical proof of the crime, the public opprobrium associated with the accusation, the unwillingness of some victims to testify, and a general lack of confidence in the jury to assess the credibility of child witnesses." ***State v. Krause***, 82 Wn. App. 688, 696, 919 P.2d 123 (1996). Defendants may not insulate themselves by committing connected offenses then leave the jury to make sense of a fragmented version of events by claiming the exclusion of their crimes is necessary to conceal their bad character. ***State v. Lillard***, 122 Wn. App. 422, 431, 93 P.3d 969 (2004). For they "cannot, by multiplying [their] crimes, diminish the volume of competent testimony against [t]h[e]m." ***State v. Tharp***, 27 Wn. App. 198, 205, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981).

Each factor underlying the need for common scheme evidence is present in defendant's case. He secretly raped H.H. at times and in places he controlled. H.H. was a predictably vulnerable child. She lost her father at an early age, and was entering adolescence in a new state amid financial hardships defendant was mitigating. The public opprobrium attending the

crimes could hardly be overstated. Fear and embarrassment coupled with a desire to put the shame of the abuse behind her resulted in delayed disclosure; a foreseeable byproduct of his scheme, which he used to attack her credibility. A tactic which could have tricked jurors unfamiliar with such insidious behavior had A.F.'s testimony not exposed the architecture of his scheme.

The great value of A.F.'s scheme exposing account outweighed its prejudicial effect as comparable testimony has in the sad catalogue of similar cases where common scheme testimony was properly admitted. ***Kennealy*** is such a case. This Court rejected arguments defendant has advanced in this appeal, finding Kennealy:

> (1) told both S.J. and some of the prior misconduct witnesses not to tell anyone about what had happened; (2) committed the acts in a place or in a way that went unnoticed by others—either because he was out of view of others or because he was alone with children; (3) committed the acts on children who were related to him or lived and played close to him; (4) committed the acts only after the children knew him and trusted him, either because of a family relation or because he gave them popsicles, cappuccinos, or other treats, and talked to them on the playground; (5) chose victims whose ages ranged from 5 to 12 years old; (6) touched the girls both under and outside of their clothing on their vaginas; and (7) committed sexual acts more than once with most of the girls.

Id. at 889. Only Kennealy's more brazen targeting of children outside his home sets him apart from defendant, but it is a difference that makes admissibility an easier call in defendant's case.

Another pedophile adhering to a similar scheme can be found in ***Sexsmith***, where, like defendant's case:

> [T]here was a substantial similarity between the abuse of A.S. and C.H. ... Sexsmith was in a position of authority over both girls. He was A.S.'s biological father and appears to have been the primary father figure for C.H. beginning at age 7 until C.H. moved out at age 18. Both girls were about the same ages when they were molested by ... Sexsmith.
>
> In both cases, ... Sexsmith would isolate the girls when he abused them. While he resided at his mother's home, he molested both of the girls in the basement. In both cases, he forced the girls to take nude photographs, watch pornography, and to fondle him.

State v. Sexsmith, 138 Wn. App. 497, 505-06, 157 P.3d 901 (2007). Time lapse between victims and the absence of unique features was not enough to overwhelm the probative value of the evidence due to the cumulative similarity among crimes. *Id.* Kindred patterns of misconduct were met with like rulings in ***DeVincentis***, 150 Wn.2d at 22-23; ***Gresham***, 173 Wn.2d at 422-23; and ***Krause***, 82 Wn. App. 695-96. *See also* ***Lough***, 125 Wn.2d at 861; ***State v. Thompson***, 169 Wn. App. 436, 477-79, 290 P.3d 996 (2012); ***State v. Williams***, 156 Wn. App. 482, 489-92, 234 P.3d 1174 (2010).

Courts will generally find the probative value of common scheme evidence is substantial in cases like this one where the child victim's testimony is the principal evidence of the crime. ***Sexsmith***, 138 Wn. App.

at 506. Conversely, there is no reason to rate common scheme evidence to be more prejudicial in this case than those where it was properly admitted. The trial court carefully considered the potential for prejudice, then abated it by introducing A.F.'s testimony and closing the case with limiting instructions that confined her testimony to its proper purpose. CP 123, 160 (Inst. 5); 3RP 199-206; 15RP 1669. It is presumed those instructions were followed. ***Yates***, 161 Wn.2d at 763. The challenged ER 404(b) ruling should be affirmed.

c. The challenged ruling was harmless if error since defendant's theory of the case would have opened the door to A.F.'s testimony in the State's rebuttal.

Mistaken ER 404(b) rulings are nonconstitutional error which will not undermine a conviction absent a reasonable probability a verdict was affected by the error. ***State v. Everybodytalksabout***, 145 Wn.2d 456, 468, 39 P.3d 294 (2002). A trial court's ER 404(b) ruling may be affirmed on any supported basis. ***State v. Kelley***, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992). And defendants can open the door to otherwise inadmissible evidence. ***State v. Hartzell***, 156 Wn. App. 918, 934, 237 P.3d 928 (2010); ***State v. Gefeller***, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); ***State v. Ortega***, 134 Wn. App. 617, 626, 142 P.3d 175 (2006).

A.F.'s testimony would have become admissible to rebut the copy-cat theory defendant advanced through his testimony, where he alleged H.H. fabricated the abuse from her knowledge of A.F.'s "accusations" to

retaliate against his conscientious efforts to supervise her internet activity. 17RP 1947-51; 1963, 1966-69,[28] 1970-71,[29] 1972-74,[30] 2053-55. By framing the disclosures underlying two convictions as "accusations" and claiming H.H. used them to fabricate an allegation of abuse, defendant would have opened the door to A.F.'s testimony had it not been admitted under ER 404(b). For the credibility of those claims could only have been assessed by comparing H.H.'s disclosure against A.F.'s account. Without the comparison, the truth as to whether H.H. misused awareness of another girl's tragedy to ruin defendant's life for mundane parental supervision could not be known. His convictions reveal how the credibility call would have gone. He cannot blame that outcome on the challenged ER 404(b) ruling as it did not compel him to pursue his copy-cat defense at trial. *See* ***State v. Brown***, 113 Wn.2d 520, 539, 782 P.2d 1013 (1990); ***McGautha v. California***, 402 U.S. 183, 213, 91 S. Ct. 1454 (1971)).

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[28] "The statement goes to the heart of his theory ... it was her plan to accuse him falsely if he did not leave her alone, and ... then carried out her plan accordingly."

[29] "[H]er grandmother ... told her all about the accusations against me and ... all ... she would need to do is say ... I had touched her...."

[30] "Again, she became angry with me and told me that I wasn't her father. I couldn't tell her what to do. And ... she was aware of the former accusations, and all ... she had to do was ... say ... I had touched her, and I would be in trouble...."

2. A.F's ABSTRACT REMARK ABOUT A TIME DEFENDANT SPENT IN PRISON WITHOUT ANY MENTION OF AN UNDERLYING CRIME WAS RIGHTLY DEEMED INADEQUATE TO SUPPORT A MISTRIAL BECAUSE IT WAS A HARMLESS RESPONSE TO DEFENSE CROSS EXAMINATION ABOUT FAMILY HISTORY AFFECTED BY THAT EVENT.

Trial judges are best placed to assess the impact of an irregularity on a proceeding, so they are vested with broad discretion to determine whether a mistrial should be granted. ***State v. Perez-Valdez***, 172 Wn.2d 808, 819, 265 P.3d 853 (2011). Denial of a mistrial will be disturbed only when there is a substantial likelihood an error affected the verdict. ***State v. Rodriguez***, 146 Wn.2d 260, 269, 45 P.3d 541, 545 (2002). According to the Supreme Court, mistrials should be avoided unless a defendant has been so prejudiced it is necessary for a fair trial. *Id.*

The trial court excluded reference to defendant's convictions for molesting A.F. as well as his resulting imprisonment. 4RP 289-92. A.F. was advised of the ruling just before testifying. 15RP 1665-67. At the time A.F. was a thirty year old lighting manager, not a professional witness. 15RP 1670-71. She abided by the instruction during direct examination. 15RP 1670-79. Defendant's cross-examination followed. 15RP 1709. He inquired about A.F.'s history of interactions with her brother Donnie.[31] She

[31] His son and H.H.'s stepfather.

inadvertently dated an interaction in relation to a period of defendant's imprisonment:

> **DEFENSE**: Prior to the family moving to Washington, were you aware that they were contemplating moving in with your [defendant] and Laura?
> **A.F.**: Yes.
> **DEFENSE**: And how did you become aware of that?
> **A.F.**: Donnie had come to visit Washington, and my – I believe my dad was still in prison, but was – sorry. Anyway, so –

15RP 1710-11. Defendant moved for a mistrial. 15RP 1711. The court "blamed [it]self ... for not ... refreshing [A.F.'s] memory after lunch," then reviewed controlling precedent. 15RP 1713-14. Relying on ***State v. Hager***, [32] the trial court denied the motion:

> [I]t's to a collateral issue ...in this particular case.... The comment itself was in response to a question. I don't believe bad faith was involved. I did not hear anything from the jury ... indicat[ing] they took it differently than ...other ... testimony .... I also feel ... no other person ... made a comment regarding this ... issue.
>
> [T]he jury did not hear ... it was connected to this case, but that he was simply in prison, and that was a reason why there hadn't been contact.
>
> There has been ... potentially prejudicial evidence ... allowed into this case, and the Court has given ... instructions already on what it's to be considered for.... [T]he jury can also ... have an instruction that would not allow them to consider the last sentence ....

[32] ***State v. Hager***, 171 Wn.2d 151, 156-, 248 P.3d 512 (2011)(reversed Court of Appeals and affirmed trial court's denial of mistrial based on detective's improper description of defendant as "evasive.").

> [] I put my faith, as the Supreme Court did, in the jury's commonsense ... it is not going to be something ... fateful for [its] decision as to guilt or innocence. I think the most important evidence is not whether he went to prison. It doesn't indicate a propensity ... he... did this particular case [sic], but I think it's going to be the credibility of the witnesses and not whether or not he went to prison ....

15RP 1714-23. The jury was directed to disregard the challenged answer. 15RP 1724-26; 16RP 1731-32.

It was not a manifest abuse of discretion to deny a mistrial. The court abided by approved methods of addressing a lay witness' inadvertent remark about defendant's imprisonment, which did not disclose conviction for a crime similar or identical to the one on trial. ***State v. Condon***, 72 Wn. App. 638, 649-50, 865 P.2d 521 (1993) (distinguishing ***State v. Escalona***, 49 Wn. App. 251, 254, 742 P.2d 190 (1987); ***State v. Wilburn***, 51 Wn. App. 827, 832, 755 P.2d 842 (1988)); ***State v. Johnson***, 60 Wn.2d 21, 26-30, 371 P.2d 611 (1962); ***State v. Carter***, 77 Wn. App. 8, 13, 888 P.2d 1230 (1995). The test for determining whether such a remark is reversible error is whether it so tainted the proceeding it resulted in an unfair trial. ***State v. Nettleton***, 65 Wn.2d 878, 880-81, 400 P.2d 301 (1965)(harmless reference to parole). Factors to consider are the remark's seriousness, redundancy and the presence of a curative instruction. ***State v. Johnson***, 124 Wn.2d 57, 76, 873 P.2d 514, 526 (1994). Mistrials are not generally granted when the remark was an isolated-inadvertent reply by a lay witness and a curative instruction was given.

A.F. was not a professional state's witness practiced at conforming to orders *in limine* while describing difficult life experiences. She was a thirty year old "lighting ... manager" haled into a courtroom of strangers to give a comprehensive account of protracted sexual abuse she endured as a child. 15RP 1670-71. She was asked to explain two decades of familial interactions inescapably impacted by the abuse as well as defendant's associated imprisonment; while providing truthful testimony conforming to an artificial-judicial edit requiring her to omit natural mention of the imprisonment despite its influence on the interactions discussed and its status as a frame of reference for when they occurred.

An analogous irregularity involving a lay witness was adequately addressed through a curative instruction in ***Johnson***, 60 Wn.2d at 26-30. There, while similarly responding to a question about the timing of a relevant event, the mother of a state's witness replied:

> The only thing he told me was that he was going to Everett. *He was supposed to go in and see his parole officer.*

Id. In affirming denial of a mistrial, the Court looked to ***State v. Priest***, 132 Wash. 580, 584, 232 P. 353 (1925), which wisely observed:

> The law ... must presume, ...the jury finds ... facts from the evidence the court permits [it] to consider. Any other rule would render the administration of the law impractical. **The state in criminal trials cannot choose its witnesses. It must call those who have knowledge of the facts, whether they be willfully designing or stupidly ignorant, and, if new trials were granted because of their irresponsive answers, the administration of the criminal**

> **laws would become so burdensome as to deny the state the protection afforded by such laws.** []

Johnson, 60 Wn.2d at 29 (emphasis added)(accord ***State v. Gamble et.al***, 168 Wn.2d 161, 178-79, 225 P.3d 973 (2010)(greater tolerance for the irregularities introduced by lay witnesses; harmless reference to "booking file"); ***State v. Hill***, 76 Wn.2d 557, 563, 458 P.2d 171 (1969)(Denial of mistrial affirmed despite testimony incarceration was needed to keep Hill from killing a witness); ***State v. Kraus***, 21 Wn. App. 388, 390, 584 P.2d 946 (1978)(harmless "parolee photo" remark); ***State v. Emery***, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

The trial court correctly found A.F.'s vague remark to be curable through an instruction because it did not imply the imprisonment was tied to a similar case, significantly reducing the risk of misuse as propensity evidence. The remark did not provide enough information to logically tie defendant's imprisonment to A.F.'s molestations. It referred to a time when A.F. was an adult discussing Donnie's plans to move H.H.'s family into defendant's house. One would not likely assume such a move would coincide with defendant's release from prison for child molestation.

There is reason to believe the lay jurors perceived prisons to be crowded with nonviolent offenders. ***United States v. Loaiza-Sanchez***,

622F.3d 939, 942 (8th Cir. 2010).[33] The impact was further mitigated by the court's promptly issued curative instruction. It was then buried in about twenty six years of A.F.'s family history with a detailed account of all the abuse she endured as a child. 16RP 1734- 77. Then redirect. 16RP 1777-88. Then more cross-examination. 16RP 1793-95. All of which fell into a broader context adduced through thirteen other witnesses who testified over a two week trial in which forty six exhibits were admitted. Defendant was among them, giving jurors the ability to assess his credibility. Concluding instructions reinforced the earlier direction to disregard the challenged remark by reminding jurors stricken evidence could not be considered. *E.g.*, CP 154. They are presumed to have followed those instructions. ***Johnson***, 60 Wn.2d at 29. The mistrial was properly denied.

3. EXPERT TESTIMONY TO EXPLAIN DELAYED REPORTING IS ADMITTED IN CASES LIKE DEFENDANT'S WHERE JURORS NEED TO UNDERSTAND THAT ABUSED CHILDREN OFTEN INCREMENTALLY REVEAL THEIR VICTIMIZATION OVER TIME.

Expert testimony about the recognized characteristics of delayed reporting common to sexually abused children is admissible to help jurors

[33] "Nonviolent offenders constitute over 60% of the prison and jail population. John Schmitt, Kris Warner & Sarika Gupta, The High Budgetary Cost of Incarceration, Ctr. for Econ. & Policy Research, 1 (June 2010)."

assess the credibility of a child victim in a sexual misconduct case. ***State v. Petrich***, 101 Wn.2d 566, 575-76, 683 P.2d 173 (1984), *overruled on other grounds by* ***State v. Kitchen***, 110 Wn.2d 403, 756 P.2d 105 (1988). ***State v. Graham***, 59 Wn. App. 418, 424-25, 798 P.2d 314 (1990); ***State v. Madison,*** 53 Wn. App.754, 765, 770 P.2d 662 (1989); ER 702; *see also* ***United States v. Bighead***, 128 F.3d 1329, 1330-31 (9th Cir. 1997); ***State v. Warren***, 165 Wn.2d 17, 44, 195 P.3d 940, 951 (2008). Such evidence enables more accurate fact finding because:

> To an average juror, it may appear ... a delay in reporting sexual abuse by ... a child ... strongly indicates ... the alleged event never happened....

Graham, 59 Wn. App. at 425; ***Madison***, 53 Wn. App. at 765. Jurors remain free to disbelieve the expert or conclude delayed reporting in a given case resulted from other circumstances revealed at trial. *Id.*; ***State v. Ciskie***, 110 Wn.2d 263, 274-75, 751 P.2d 1165 (1988). The admission of delayed reporting expert testimony under ER 702 should be affirmed absent a manifest abuse of discretion. ***Petrich***, 101 Wn.2d at 575; ***State v. Stevens***, 58 Wn. App. 478, 497-98, 794 P.2d 38, 48 (1990).

Defendant denied the charged acts of child rape occurred, claiming H.H.'s delayed report was a false accusation purposed to retaliate against him for supervising her internet activity. *Supra*; 7RP 379-82. The court admitted the testimony over defendant's objection because:

> Delayed disclosure is a recognized phenomena in ... child abuse cases.... [I]t's been brought up, it's talked about, the

> fact ... an expert witness is going to testify ... will help the jury make a better decision in regards to the credibility or non-credibility of the witness when they have the opportunity to hear an expert talk about the phenomena, either good or bad, and is subject to cross-examination.

7RP 383-83. Consistent with the State's proffer, defendant attacked H.H.'s credibility through extensive cross-examination, much of which focused on the timing of her incremental disclosures.[34] A representative example appears in a line of questions beginning at 9RP 598:

> **DEFENSE**: Did you tell anyone about the other incident that you remembered?
> **H.H.**: No.
> **DEFENSE**: Is there a reason why you didn't tell anyone?
> **H.H.**: No.
> **DEFENSE**: Before you testified yesterday, did you tell the prosecuting attorney ... there was another incident ... you remembered ... you did not remember back on February 24th ?
> **H.H.**: No.
> **DEFENSE**: Is there a reason why?
> **H.H.**: I was disgusted by it.

9RP 598-99. Others examples appear later:

> **DEFENSE**: You remembered at that time ... he had done that, but you purposely didn't talk about it. Is that your testimony?
> **H.H.**: Yes. [] ...
> **DEFENSE**: And you knew ... all you had to do was just pick up the phone and tell them, right?
> **H.H.**: Yes.
> **DEFENSE**: And you never did that, did you?
> **H.H.**: No. [][35]

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[34] *E.g.*, 8RP 557-59, 565-83; 9RP 595-666, 678-91, 725-36.
[35] 9RP 621-22, 629; *e.g.*, 9RP 647-48, 659, 727-30.

Instances in which H.H. told people she was okay to avoid discussing the abuse were characterized as lies. *E.g.*, 659-60. In summation, defendant argued H.H.'s account "defie[d] logic and commonsense." 18RP 2146.

The challenged expert testimony was adduced from a Mary Bridge Hospital Forensic Interviewer after H.H.'s credibility was attacked. 12RP 1160, 1188. Without opining about H.H.'s credibility, the interviewer provided an overview of the delayed disclosure phenomena:

> [] Children often wait until ... [a] tim[e] [or] circumstance ... makes them feel like it's time to tell. Circumstances being a change in living environment, a developmental change. It could be ... the abuse is escalating ....
>
> [U]nderstanding about delayed disclosure is ... disclosures are not ... a one-time event....
>
> [R]esearch tells us [delayed disclosure] ... could be based on a relationship ... with the alleged suspect ... what ... subjects ... tell kids, ... promises [or] threats ... made...

12RP 1187-92, 1198-12. Delayed disclosures were described as a "very common" phenomena. 12RP 1193-98.

The trial court properly admitted this testimony in accordance with precedent, for it educated jurors about the delayed disclosure phenomena without improper direct assessment of H.H.'s credibility. ***Petrich***, 101 Wn.2d at 575-76; ***State v. Holland***, 77 Wn. App. 420, 427, 891 P.2d 49 (1995); ***Graham***, 59 Wn. App. at 425; ***State v. Stevens***, 58 Wn. App. 478, 497, 794 P.2d 38 (1990). Absent the testimony, jurors ignorant of the

phenomena may have wrongly perceived her failure to comprehensively report every aspect of the abuse at once to be a tell-tale sign of deception.

Defendant has not challenged the expert's qualifications. Instead, he contends her testimony was "not necessary" since H.H. explained her reasons for postponing disclosure. But expert testimony about delayed reporting is allowed because courts recognize jurors are often ill-equipped to fairly weigh the credibility of such explanations due to long held but discredited beliefs that truthful victims report abuse right away. ***Ciskie***, 110 Wn.2d at 274-75; ***State v. Landrum***, 66 Wn. App. 791, 801, 832 P.2d 1359, 1365 (1992). Evidence Rule 702 is also framed in terms testimony's helpfulness, not necessity, so defendant's challenge misstates the rule. The State is entitled to prove its case with overwhelming-admissible evidence that is not substantially outweighed by any prejudicial effect. ER 403; ***Old Chief v. United States***, 519 U.S. 172, 186, 117 S. Ct. 644 (1997).

Defendant further contends the challenged testimony vouched for H.H.'s testimony. There is no "vouching" in the expert's general testimony about reporting behavior common to child victims. *See* ***State v. Chavez***, 76 Wn. App. 293, 299, 884 P.2d 624 (1994). To the extent it corroborated H.H.'s explanation for her behavior, the door was opened to it when defendant attacked her credibility with cross-examination directed at the timing of her disclosures. ***Ciskie***, 110 Wn.2d at 286; ***State v. Froehlich***, 96 Wn.2d 301, 305, 635 P.2d 127 (1981). Instruction No. 6 apprised the jury of its authority to disregard the expert's testimony. CP 161.

Instruction No. 1 likewise made it clear the jury was free to disbelieve H.H.'s testimony. Defendant was not entitled to verdicts predicated on misconceptions about how honest rape victims behave.

4. DEFENDANT'S CUMULATIVE ERROR CLAIM IS WITHOUT MERIT BECAUSE NO ERROR, MUCH LESS A PREJUDICIAL AGGREGATION OF ERROR, HAS BEEN PROVED.

"The integrity of every jury verdict is important ...." ***Kappelman v. Lutz***, 141 Wn. App. 580, 591, 170 P.3d 1189 (2007), *aff'd*, 167 Wn.2d 1, 217 P.3d 286 (2009). It is well settled "[a] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 231, 93 S. Ct. 156 (1973). Reversal for cumulative nonconstitutional error is only appropriate where an aggregation of errors materially affected the outcome of a case. ***Russell***, 125 Wn.2d at 93-94.

A.F.'s unfortunate remark about defendant's imprisonment is the only correctly identified irregularity; still, it was not a manifest abuse of discretion for the trial court to find the error undeserving of a mistrial. There was likewise no abuse of discretion in admitting A.F.'s testimony as proof of his common scheme for abusing underage females in his home. Admission of the delayed disclosure testimony was equally appropriate after defendant put the timing of H.H.'s disclosure at issue.

A materially affected outcome has not been shown even if one assumes the alleged mistakes were made, for defendant's guilt was well

proved. H.H.'s detailed accounts of protracted abuse were subjected to grueling cross-examination. They were then circumstantially corroborated. There were his texts to H.H. bearing a tone befitting an insecure adolescent suitor. His corroborated creation of opportunities to be alone with her through shop time, movie dates, sleepovers and laundry room visits. And his impeached claim he refrained from private contact with H.H. in observance of a family "pact" unknown to her parents. There was also his hysterical, suicidal,[36] reaction to news of H.H.'s disclosure, punctuated by his production of H.H.'s old emails, consistent his promise to reveal them if she reported him. The truth of his crimes was clear.

D. CONCLUSION.

Defendant's scheme for sexually abusing underage female family members under his care was properly exposed through A.F.'s testimony. His jurors were rightly apprised of the factors other than dishonesty that could account for a child's incremental disclosure of abuse. And the mistrial defendant sought was unwarranted as the abstract reference to his

[36] "When suspicions from without begin to embarrass him, and the net of circumstance to entangle him, the fatal secret struggles with still greater force to burst forth. It must be confessed, it will be confessed; there is no refuge from confession but suicide, and suicide is confession." The Writings and Speeches of Daniel Webster, Legal Arguments and Diplomatic Papers: *The Murder of Captain Joseph White*, Vol. 11, p. 54, Little, Brown & Company (1903).

imprisonment was adequately addressed through instructions. Defendant's well-founded convictions should be affirmed.

RESPECTFULLY SUBMITTED: June 17, 2016.

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WSB # 38725

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant ~~and appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-17-16 Theresa Kal
Date Signature

PIERCE COUNTY PROSECUTOR

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